The Honorable William L. Dwyer

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. THE CITY OF SEATTLE, and MUNICIPALITY OF METROPOLITAN SEATTLE, Defendants.	NO. C90-0395-WD DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS FIRST CLAIM FOR RELIEF FRCP 12(b)(6)

This brief is submitted in support of the named Defendants' motion for dismissal of Plaintiff's first claim for relief under Federal Rule Civil Procedure 12(b)(6).

Plaintiff's first claim alleges violations of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (hereinafter CERCLA 1980) as amended by

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the Superfund Amendments and Reauthorization Act of 1986 (commonly know as SARA, hereinafter CERCLA 1986), 42 U.S.C. § 9601, et seq. The facts from which Plaintiff's allegations arise involve alleged "releases" of "hazardous substances" into Elliott Bay and the lower Duwamish River through sanitary sewer and drainage systems owned and/or operated by Defendants, which sanitary sewer and drainage systems include "combined sewer overflows" (CSOs).

The United States as named Plaintiff, has brought this action on behalf of the Secretary of the Department of Commerce. The Secretary is the designated trustee under the National Contingency Plan, 40 C.F.R. Part 300, for natural resources which are managed or protected by the Department of Commerce or by other federal agencies and that are found in or under waters navigable by deep draft vessels, in or under tidally-influenced waters, or waters of the contiguous zone, the exclusive economic zone, and the outer continental shelf, and in upland areas serving as habitat for marine mammals and other protected species. 40 C.F.R. § 300.600.

Plaintiff Has Failed to Meet the Statute of Limitation.

Defendants' motion to dismiss Plaintiff's first claim for relief focuses on three dates from which the statute of limitations could have begun to run against Plaintiff's claims: (i) the date when Plaintiff knew or should have known of any loss to natural resources in Elliott Bay and the lower Duwamish

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River and its connection with any release(s) in question; (ii) the date three years after the enactment of CERCLA 1980; and (iii) the date on which the "regulations" referred to in CERCLA 1986 § 113(g)(1) were promulgated.

CERCLA, as originally enacted in 1980 (CERCLA 1980), contained a statute of limitations for natural resource damage claims, which in relevant part provided that "[n]o claim may be presented, nor may an action be commenced for damages under this title, unless that claim is presented or action commenced within three years from the date of the discovery of the loss or the date of enactment of this Act, whichever is later . . . ." CERCLA 1980 § 112, Pub. L. 96-510, 94 Stat. 2767, 2795 (Dec. 11, 1980).

CERCLA's statute of limitations for natural resource damage claims, as amended in 1986 (CERCLA 1986), provides in relevant part that "no action may be commenced for damages . . . under this chapter, unless that action is commenced within 3 years after the later of the following: (A) The date of the discovery of the loss and its connection with the release in question. (B) The date on which regulations are promulgated under § 9651(c) of this title." 42 U.S.C. § 9613(g)(1).

I. KNOWLEDGE: For the purpose of determining the running of the statute of limitations, Plaintiff had the requisite knowledge on or before December 11, 1980 of any loss to natural

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resources in Elliott Bay and the lower Duwamish River and its connection with the release(s) in question.

The parties to this suit all have responsibilities that require familiarity with the environmental condition of Elliott Bay and the lower Duwamish River. Plaintiff, for example, administers the Federal Water Pollution Control Act (FWPCA). 33 U.S.C. §§ 1251 to 1387. Pursuant to this Act, the Administrator of the Environmental Protection Agency (EPA) was required to submit to Congress by October 1, 1978 a report on the status of combined sewer overflows in municipal treatment works. 33 U.S.C. § 1375(c). The FWPCA required this report to address each project funded under the Act. Id. The Court will note from the complaint that alleged "releases" from combined sewer overflows form part of the basis of Plaintiff's complaint. In addition, EPA and the National Oceanic and Atmospheric Administration (Department of Commerce) both maintain offices in the geographic vicinity of, and with jurisdiction over, Elliott Bay and the lower Duwamish River.

As can be seen from the complaint, the facts which form the basis for Plaintiff's allegations do not involve a "spill" or a single event or occurrence. Plaintiff, through the activities of its agencies in the Puget Sound area, is well aware of the conditions in Elliott Bay and the lower Duwamish River. Voluminous evidence exists, which can demonstrate this knowledge.

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Defendants presume for the purposes of this motion that Plaintiff will not dispute that it had the requisite knowledge on or before December 11, 1980 to bring a natural resource damage action against Defendants. If Plaintiff contests this presumption, Defendants invite Plaintiff to make such an assertion in its response to this motion and the Court may then treat this motion as a motion for partial summary judgment.

Absent the issue of knowledge as triggering the beginning of the limitations period, the statute of limitations governing Plaintiff's claims against Metro and the City of Seattle is either three years from the enactment of CERCLA 1980 or three years from the date the "regulations" referred to in CERCLA 1986 § 113(g)(1) were promulgated.

II. CERCLA 1980: The statute of limitations expired three years from the date of enactment of CERCLA 1980.

Absent the issue of knowledge, the statute of limitations ran on December 11, 1983, because Congress enacted CERCLA on December 11, 1980.

The enactment of CERCLA 1980 created a new federal cause of action which did not exist at common law.[1] Among its

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[1] CERCLA's legislative history shows that Congress determined the natural resource provisions of CERCLA were necessary because traditional common law tort theories did not adequately address the problems caused by the release of oil or hazardous substances, and did not adequately remedy the losses caused by such releases. See H.R. Rep. No. 172, part 1, 96th Cong., 1st Sess. 17 (1979); S.Rep. No. 848, 96th Cong., 2d Sess. 84 and 233 (1980). "S. 1480 changes State tort law

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provisions, CERCLA 1980 created for the first time a cause of action for damages to public natural resources.[2] The time within which a cause of action for natural resource damage could be commenced by Plaintiff was set forth in Section 112(d) of CERCLA 1980, which provided, in part:

> No claim may be presented, nor may an action be commenced for damages under this title, unless that claim is presented or action commenced within three years from the date of the discovery of the loss or the date of enactment of this Act, whichever is later . . . .

Since Plaintiff had requisite knowledge prior to December 11, 1980, Plaintiff was required to file suit by December 11, 1983. Plaintiff, however, failed to file suit against Defendants until March 19, 1990. Plaintiff's cause of

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by developing a new Federal tort law which allows individual claimants to enter court more easily and to proceed with a suit despite a paucity of evidence. This is a creation of a Federal cause of action which constitutes an intrusion into judicial process that have been formulated over hundreds of years common law evolution and procedural development upon which industries and businesses have relied in assessing their exposure to liability and . . ." S. Rep. No. 848, 96th Cong., 2d Sess. (1980), at 119-22.

[2] One of the principle differences between CERCLA and the common law was that CERCLA created the fiction of a natural resource trustee so that standing would exist for the recovery of damages to public natural resources. See Anderson, Natural Resources Damages, Superfund and the Courts, 16 Envtl. Aff., 405, 411 (1989) ("Because resources themselves do not have standing to sue, Congress invented the resources guardian or trustee. Liability is to the federal government or to the states as trustees of the affected natural resources."). "The President or the authorized representative of a state acts on behalf of the public as trustee of such natural resources in order to recover for damages." SARA, House Energy and Commerce Committee Report 99-253 to H.R. 2817.

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action for damages was, therefore, extinguished by Section 112(d).

III. CERCLA 1986: The statute of limitations ran on August 1, 1989, because that was three years from the date on which the "regulations" referred to in CERCLA 1986 § 113(g)(1) were promulgated.

If not barred on December 11, 1983 by the running of the statute of limitations under CERCLA 1980, and absent any issue of requisite "knowledge," the statute of limitations ran on August 1, 1989, because the regulations referred to in CERCLA 1986 § 113(g)(1) were promulgated on August 1, 1986.

CERCLA 1980 and 1986 § 301(c) directed the President to promulgate regulations so that trustees would have guidance in conducting natural resource damage assessments (NRDA). 42 U.S.C. § 9651. The President delegated the task of promulgating these regulations to the Department of the Interior (DOI). Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (Aug. 14, 1981), superseded by Exec. Order No. 12,580, 52 Fed. Reg. 2,923 (Jan. 29, 1987); see 44 U.S.C. § 1507; Hagen v. Porter, 156 F.2d 362, 365 (9th Cir. 1946), cert. denied, 67 S.Ct. 85 (1946) (courts shall take judicial notice of the Federal Register's contents). The Act further provided that damage assessments conducted pursuant to these regulations would have the force and effect of a rebuttable presumption. CERCLA 1980 § 111(h)(2), replaced by CERCLA 1986

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§ 107(f)(2)(C), 42 U.S.C. § 9607(f)(2)(C). CERCLA 1980 § 301(c) also required DOI to promulgate the NRDA regulations not later than two years after its enactment. See 42 U.S.C. § 9651(c). DOI failed to promulgate the regulations according to this schedule. New Jersey v. Ruckelshaus, No. 84-1668 (D.N.J., Dec. 12, 1984), aff'd mem., 782 F.2d 1031 (3d Cir. 1986). Congress later amended CERCLA 1980, and created a new statute of limitations for natural resource damage claims. 42 U.S.C. § 9613(g)(1).

On August 1, 1986, DOI promulgated regulations that contained the overall administrative process for conducting natural resource damage assessments, as well as the "Type B" assessment procedures. 51 Fed. Reg. 27,673 (Aug. 1, 1986), codified at 43 C.F.R. Part 11. The "Type B" procedures are "alternative protocols for conducting assessments in individual cases to determine the type and extent of short- and long-term injury, destruction, or loss." 42 U.S.C. § 9651(c). The "Type B" procedures as a matter of technical applicability can be used to assess damages to natural resources under all circumstances. See 43 C.F.R. Part 11, § 11.33 and subpart E.

The only portion of the NRDA regulations not promulgated on August 1, 1986 were the "Type A" procedures. The "Type A" procedures are "standard procedures for simplified assessments requiring minimal field observations . . . ." 42 U.S.C. § 9651(c). DOI reserved a single subpart in 43 C.F.R. Part 11

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to accommodate the "Type A" procedures. 51 Fed. Reg. 27,673, 27,726 (Aug. 1, 1986).

DOI promulgated on March 20, 1987 the first of what will be a series of "Type A" procedures. Colorado v. United States, 880 F.2d 481, 485 (D.C. Cir. 1989); 52 Fed. Reg. 9,042 (Mar. 20, 1987), codified at 43 C.F.R. Part 11, subpart D. The federal government's comments accompanying this set of "Type A" procedures indicated that these rules were to supplement and amend the regulations promulgated on August 1, 1986. 52 Fed. Reg. 9,042 (Mar. 20, 1987).

The "Type A" procedures promulgated on March 20, 1987 apply only to coastal and marine environments and only under limited circumstances. Colorado v. United States, 880 F.2d 481, 484 (D.C. Cir. 1989); 43 C.F.R. §§ 11.33, 11.41. For example, these procedures are appropriate for assessing damage due to a release only if the following criteria apply: (i) of short duration; (ii) minor; and (iii) a single event.

The regulations promulgated on March 20, 1987 also only cover a limited number of cases for which "Type A" procedures could apply. Colorado, 880 F.2d at 483. DOI had selected marine and coastal environments as the first area for which it would develop "Type A" procedures because "much more extensive information was available on the fate and effects of discharges or releases of oil or hazardous substances in these environments than for other ecosystems and natural resources." Id. at 488, quoting 52 Fed. Reg. 9,048, 9,053 (Mar. 20, 1987).

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The court in Colorado upheld DOI's incremental approach to promulgating "Type A" procedures, but directed DOI "to promulgate, as expeditiously as possible, further type A regulations to cover as many types of releases in as many different kinds of environments as feasible." 880 F.2d at 483.

DOI has already published advanced notices of proposed rulemaking for an additional set of "Type A" procedures applicable to the environments of the Great Lakes. 53 Fed. Reg. 20,143 (June 2, 1988); 54 Fed. Reg. 39,015 (Sept. 22, 1989). DOI has also suggested examples of other environments and natural resources for which additional "Type A" procedures might be developed. 53 Fed. Reg. 20,143, 20,146 (June 2, 1988). These are rivers, lakes, wetlands, ground water, soil and air. Id.

DOI further amended the NRDA regulations on February 22, 1988 and on March 25, 1988. 53 Fed. Reg. 5,166 (Feb. 22, 1988); 53 Fed. Reg. 9,769 (Mar. 25, 1988). DOI has also published advanced notices of proposed rulemaking for additional amendments to these rules. 53 Fed. Reg. 20143 (June 2, 1988); 54 Fed. Reg. 39,013, 39,015, 39,016 (Sept. 22, 1989); 54 Fed. Reg. 41,363 (Oct. 6, 1989) (correction to earlier notice); 54 Fed. Reg. 43,185 (Oct. 23, 1989) (extension of comment period). In summary, the "Type A" regulations already promulgated and those to be promulgated are irrelevant to both this litigation and to the issue of when the three year statute of limitations began to run under CERCLA 1986

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§ 113(g)(1). If "Type A" procedures were relevant to the determination of the three-year statute of limitations, the limitation would continually recede into the future. DOI could at will extend the three-year period by merely promulgating another set of "Type A" procedures.

Perhaps the best test for determining when the "regulations" referred to in CERCLA 1986 § 113(g)(1)(B) came into existence is to ascertain when trustees were first able to conduct damage assessments pursuant to DOI regulations, and thereby, be eligible for the rebuttable presumption. The House Conference Report on the Superfund Amendments and Reauthorization Act of 1986 (SARA) stated that "[t]he Conferees have adopted these amendments relating to the time limits for initiating actions for natural resource damages because the ability for [sic] Federal and State trustees to pursue such claims and actions has been impaired by the failure of the President to promulgate regulations governing procedures for filing claims and assessing damages to natural resources." H.R. Conf. Rep. 99-962, 99th Cong., 2d Sess. 1, *reprinted in* 1986 U.S. Code Cong. & Admin. News 3316.

The regulations promulgated on August 1, 1986 contained all of the NRDA regulations (including the generic "Type B" regulations), except for the "Type A" procedures. Consequently, but for the statute of limitations running on December 11, 1983, a trustee could have begun a natural resource damage assessment using the "Type B" procedures 30

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days after DOI promulgated its rules on August 1, 1986. 51 Fed. Reg. 27,726 (Aug. 1, 1986), codified at 43 C.F.R. § 11.10, amended, 53 Fed. Reg. 5,166, 5,171 (Feb. 22, 1988). The absence of any "Type A" procedures at that time would not have foreclosed a trustee from conducting an assessment using DOI regulations. See 43 C.F.R. Part 11, § 11.10 and subpart E. Had a trustee conducted an assessment under CERCLA 1986 and used the regulations promulgated on August 1, 1986, it would have received the rebuttable presumption. 42 U.S.C. § 9607(f)(2)(C); 51 Fed. Reg. 27,726 (Aug. 1, 1986), codified at 43 C.F.R. § 11.11, amended, 53 Fed. Reg. 5,166, 5,171 (Feb. 22, 1988). Therefore, if the regulations promulgated on August 1, 1986 were sufficient in scope to allow a trustee to conduct a natural resource damage assessment and receive the rebuttable presumption, then these regulations are also sufficient to begin the running of the statute of limitations. Interpreting "regulations" in this manner is consistent with SARA's legislative history, is equitable, and provides an internally consistent interpretation of CERCLA 1986 § 113(g)(1) (statute of limitation) and § 107(f)(2)(C) (rebuttable presumption).

Plaintiff may argue that the "regulations" of CERCLA 1986 § 113(g)(1)(B) could not be complete or could not exist until DOI promulgated both "Type A" and "Type B" procedures. Such an interpretation, however, would create an entirely unworkable scheme. As pointed out above, DOI selected one particular

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group of environments for its first set of "Type A" regulations. The court in Colorado approved such an incremental scheme, but DOI, pursuant to its own plans and at the direction of the court, will promulgate additional "Type A" procedures for use in other environments. Consequently, if this court finds that the "regulations" referred to in CERCLA 1986 § 113(g)(1)(B) require "Type A" procedures, it would delay the running of the statute of limitations until DOI exhausted the myriad habitats for which "Type A" regulations are possible. Clearly, such a scheme would be inconsistent with Congressional intent in establishing a statute of limitations, patently unwieldy, and unduly oppressive to Defendants.

The conclusion that the regulations promulgated on August 1, 1986 are the "regulations" referred to in CERCLA 1986 § 113(g)(1) is not altered by the fact that Congress enacted SARA after DOI promulgated those regulations. Congress drafted the provisions of SARA that would amend the statute of limitations for damage actions almost entirely during 1985. See 1986 U.S. Code Cong. & Admin. News 2835. As can be seen, all of the committee reports and floor debates, other than the House Conference Report and House and Senate debates on the Conference Report, were completed before August 1, 1986. Furthermore, DOI presented a moving target because it was actively drafting NRDA regulations during the time Congress was formulating CERCLA's amendments. See 50 Fed. Reg. 1550 (Jan. 11, 1985) (notice inviting more public comments and suggesting

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public meetings); 50 Fed. Reg. 52,126 (Dec. 20, 1985) (proposed regulations and extension of comment period). Therefore, the term "regulations" in CERCLA 1986 § 113(g)(1) refers in the context of this issue simply to regulations that were not promulgated in final form at the time SARA's provisions were drafted.

The conclusion that the regulations promulgated on August 1, 1986 are the "regulations" referred to in CERCLA 1986 § 113(g)(1) is also not affected by the validity of the regulations. The NRDA regulations promulgated on August 1, 1986 and March 20, 1987 were found to be partially invalid. Ohio v. United States, 880 F.2d 432 (D.C. Cir. 1989); Colorado v. United States, 880 F.2d 481, (D.C. Cir. 1989). Had Congress wanted the statute of limitations to run from the date on which the regulations were found valid by a court, it could have so stated. To allow the statute of limitations to be determined based on the validity of regulations would violate the express language of the statute, would create tremendous uncertainty, would eviscerate the purpose of CERCLA's statute of limitations and would create an onerous burden on Defendants.

Plaintiff should receive no latitude in this case, because it delayed bringing this action long after it had the right to do so. First, the absence of NRDA regulations did not bar Plaintiff from filing a natural resource damage action within the three year statute of limitations of CERCLA 1980. 43 C.F.R. § 11.10 (assessment procedures not mandatory); see

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Colorado v. Asarco, Inc., 616 F.Supp. 822, 827 (D. Colo. 1985) (state's motion to stay proceedings pending promulgation of regulations denied); see also United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1119 (D. Minn. 1982) (assessment procedures not mandatory). Second, Plaintiff knew or should have known before August 1, 1986 the circumstances under which "Type A" procedures would be applicable. CERCLA 1980 § 301(c) specified the purpose of the "Type A" and "Type B" procedures. In addition, DOI published a notice of proposed rulemaking for the "Type A" procedures prior to the promulgation of the regulations on August 1, 1986. 51 Fed. Reg. 16,635 (May 5, 1986). Therefore, Plaintiff knew or should have known before August 1, 1986 that the "Type A" procedures would not be the most appropriate method for a natural resource damage assessment in Elliott Bay and the lower Duwamish River. In fact, Plaintiff has alleged facts in this case which would justify using the "Type B" procedures and likely preclude a "Type A" assessment. Third, the Secretary of Commerce could have under the regulations of August 1, 1986 conducted for Elliott Bay and the lower Duwamish River the pre-assessment evaluation, which must precede both "Type A" and "Type B" assessments. 43 C.F.R. Part 11, subpart B. Therefore, Plaintiff cannot assert that it had to wait beyond the effective date of the August 1, 1986 regulations to begin a damage assessment. Clearly, Plaintiff sat on its claims with no justifiable reason.

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The structure and history of the regulations promulgated by DOI pursuant to CERCLA 1980 and 1986 § 301(c), 42 U.S.C. § 9651(c), clearly show that the "regulations" referred to in CERCLA's statute of limitations, 42 U.S.C. § 9613(g)(1), could only be those promulgated on August 1, 1986. The date on which DOI promulgated the first set of "Type A" regulations and the dates on which DOI has or will further amend 43 C.F.R. Part 11 are irrelevant in computing the statute of limitations. Consequently, the statute of limitations on Plaintiff's claim ran on August 1, 1989. Plaintiff filed this suit on March 19, 1990. Therefore, Plaintiff's claim under 42 U.S.C. § 9607(a) is barred.

Respectfully submitted this 10th day of May, 1990.

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